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IN THE and early nineteenth centuries, there were no laws prohibiting either contraception or abortion before quickening.* Although we do not know the precise extent to which people used contraception or abortion in this era, we do know that over the course of the nineteenth century there was a marked increase in the use of birth control because the birth rate fell dramatically from 1800 to 1900. In the colonial era, the average family had nine children. By 1900, that number was only three. In the agrarian world of the eighteenth century, children were an important economic asset; by the end of the nineteenth century, with greater urbanization and industrialization, children were increasingly seen as a financial burden that could cause a family's economic ruin. For most families, then, birth control of one sort or another came to be seen as essential to family well-being.1

Moreover, and at the same time, the writings of the early nine-teenth-century British economist Thomas Robert Malthus generated a growing concern about the dangers of overpopulation. Malthus predicted That continued population growth would lead to poverty and social decline.

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Many of Malthus's followers saw birth control as a solution to the loosing challenge of overpopulation. Birth control would thus promote both the individual's and the society's welfare.2 These changes brought about a dramatic shift in attitudes toward birth control. During the Second Great Awakening, abortion was still perceived primarily as the business of prostitutes and as a "recourse for the desper-

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* usually quickening is the moment in pregnancy when a woman first feels fetal movement at four-and-a-half months.

ate." In the years after 1840, however, the social character of the practice began to change. Abortion rates soared, and a high proportion of those having abortions, particularly in growing urban areas, were for the first time married women of middle- or upper-class status. 3

By the 1850s, contraception and abortion were increasingly recognized as legitimate and morally acceptable practices to maintain and improve a family's economic welfare, and advertisements for birth control products and services were commonplace. By the 1870s, approximately 20 percent of all pregnancies were purposefully terminated. But then the moralists moved in.[4]

WHAT WOULD KEEP THEM CHASTE?

AMONG THE VARIOUS behaviors targeted during the Second Great Awakening, reproductive control presented a particular paradox. For many people, any form of birth control was seen as a challenge to God's will. For others, though, some form of "designed maternity" was seen as essential to the preservation of well-functioning families, a goal that also had strong moral and religious significance. In the 1840s, for example, Henry Clarke Wright, a pastor of the Congregational Church and fervent abolitionist, preached about the pitfalls of the "unwelcome child." He taught that for couples who wanted "healthy, intelligent children and happy marriages, only 'designed maternity' would do."[5]

Moreover, the Victorian attitudes about women in this era were self-contradictory. As the historian Linda Gordon has observed, women in the Victorian era were viewed as both lacking any sex drive and as potentially "depraved, lustful monsters." This contradiction stemmed from a lack of confidence in "the reality of the sexless woman," which was a construct laid uneasily, and uncertainly, on top of the earlier conception of women as "highly sexed" temptresses in the spirit of Eve.[6]

This ambivalence brought to the surface the unnerving question: "If women and men need no longer fear pregnancy as an outcome of sexual intercourse, what would keep wives faithful and daughters chaste?" As women gained control over their own reproductive destinies, the seemingly pernicious thought began to creep into the public consciousness that even for women, sex could be separated from reproduction and that freedom from pregnancy could unleash women's biblical lasciviousness. Such unbridled female sexuality would surely destabilize families, undermine social relations, and corrupt the nation's morality.[7]

OVER THE course of the nineteenth century, the law struggled With the religious and moral paradox of reproductive control. In the 1830s Americans began to learn through publications and public lectures about ways to control or prevent pregnancy. Matters that previously had been passed on in private from woman to woman now came into the light, and the increasingly public nature of these discussions further legitimized the idea of birth control.

In 1831 Robert Dale Owen wrote the first important American tract on birth control. *Moral Physiology; or A Brief and Plain Treatise on the Population Question* went through nine editions in its first five years. The work was part of Owen's larger effort "to banish religious superstition." He maintained that "reproductive control" was an essential part of a woman's "duty as an efficient and well-organized wife and mother." But he added that even unmarried women should have access to birth control, because "men who seduced women went unpunished by society, while women and their illegitimate offspring had to endure scorn and abuse."[8]

Shortly after Owen's book appeared, the Massachusetts physician Charles Knowlton published *Fruits of Philosophy; or, The Private Companion of Young Married People,* which expressly advocated contraception. Birth control, he argued, would prevent overpopulation, reduce prostitution, reduce the occurrence of abortion and infanticide, and protect the health and well-being of women and their families.

Unlike Owen, who argued that coitus interruptus was the best means of birth control, Knowlton favored postcoital spermicidal douching. He objected to coitus interruptus because, in his view, a fundamental purpose of sex was pleasure. He maintained that coitus interruptus interfered with the pleasure of both the man and the woman, whereas his preferred birth control method preserved sexual pleasure, was "sure, cheap, convenient and harmless," and placed both the right and the responsibility for birth contro1 in the woman's hands. Knowlton also supported the right of women to have abortions. 9

HOW WOULD the law respond to these disparate publications and to the growing desire of Americans to learn how to control their reproductive destinies? As we have seen the Commonwealth of Massachusetts, invoking the still-nascent doctrine of obscenity, repeatedly prose-

cuted Knowlton for *The Fruits of Philosophy,* even though the text was clearly intended to convey health information about birth control in a responsible and thoughtful manner:[10]

The Knowlton prosecutions were an important turning point in the history of the regulation of information about birth control, because they marked the first step in what would come to be an important judicial expansion of the concept of obscenity to include information about the prevention of pregnancy. Although this argument was still only implicit in the pre-Civil War era, it would come to dominate in the decades to come.[11]

But despite the attention paid by the legal authorities in Massachusetts to Knowlton's work, prosecutions of those who disseminated information about reproductive control in this era were rare. For the most part, such material was still thought to be none of the law's business.

THE TOLERATION of information about birth control in these years extended even to information about abortion. Throughout this era, abortifacients were widely available from mail-order firms and pharmacists. Daily newspapers regularly ran ads for products that promised to "cure" pregnancy-a euphemism for terminating a pregnancy. Ads for "Cherokee Pills," for example, promised that if used during the first three months of pregnancy, "the unfailing nature of their action would infallibly prevent pregnancy." At this time, the line between contraception and abortion was fuzzy. Many advertisements and informational materials discussed methods for inducing menstruation (even after insemination). Although these publications were clearly intended to help women terminate unwanted pregnancies, they were not treated any differently than publications dealing with contraception.[12]

In the 1840s, the flamboyant Ann Lohman Restell, popularly known as "Madame Restell," was the most famous abortionist in New York City. Born in England, Restell emigrated to America in 1831, where she was forced to make a living as a seamstress. She gradually developed an interest in women's health and began selling birth control products such as "preventative pills." She then turned to abortion and served a genteel, middle-and upper-middle class clientele. She charged between $50 and $100 per abortion. Her abortion business on Greenwich Street proved highly profit-

See chapter 8

able, yielding a considerable fortune and a lush mansion on Fifth Avenue Madame Restell touted her "celebrated powers for married ladies advertised extensively in the penny press of the day. For example:

> To married women: Is it but too well known that the families of the married often increase beyond what the happiness of those who give them birth would dictate? In how many instances does the hard-working father, and more especially the mother, of a poor family remain slaves throughout their lives, urging at the oar of incessant labor, toiling to live, living but to toil. ... Is it desirable, then, ... for parents to increase their families, regardless of consequences to themselves, or the well-being of their offspring, when a simple, easy, healthy, and certain remedy is within our control?13

Ads of this sort were common at the time, and the abortion trade competed openly, each boasting of its greater effectiveness, safety, and confidentiality. There were, of course, critics. Indeed, Madame Restell was often the subject of hostile press attention. The *New York Tribune* attacked her repeatedly in a series of editorial tirades against abortion, and the conservative editor of the *New York Sunday Morning News* described her practice as a "monstrous and destructive" service that "strikes at the root of all social order." Not one to shy away from a fight, Restell wrote editorials in her defense, insisting that her practice was perfectly moral and proper because she was providing women with the ability to lead effective and fulfilling lives.14

"THE EVIL OF THE AGE"

IN THE EIGHTEENTH and early nineteenth centuries, the prevailing view was that there was no human life until quickening. Blackstone's *Commentaries* (1765), for example, stated that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb," and James Wilson, one of the Framers of the American Constitution, observed that "in the contemplation of law, life begins when the infant is first able to stir in the womb." American courts followed the traditional English common law in holding that abortion before quickening was lawful, as long as the mother gave her consent.

Several generally available works, including William Buchan's Domestic Medicine (1782), Samuel K. Jennings's The Married Lady’s Companion (1808), and Dr. Thomas Ewell's Letter to Ladies (1817), offered instruction about

how to "restore menstrual flow" by such methods as bloodletting, drinking a concoction of iron and quinine, drinking tincture of black hellebore (a powerful purgative), violent exercise, douching with very hot brandy, and strong blows to the stomach. Physicians, who knew that dilation of the cervix, irritation of the uterus, and rupturing the amniotic sac could bring on contractions, used these and similar techniques to terminate unwanted pregnanci'es.[16]

DURING THE Second Great Awakening, several states enacted laws dealing with abortion. Connecticut passed a statute in 1821, for example, declaring it unlawful for any apothecary to sell any poisonous substance for the purpose of causing or procuring "the miscarriage of any woman, then being quick with child." The Connecticut law also made it a misdemeanor for anyone to attempt to induce a post-quickening abortion and a felony if the woman died "in consequence thereof"17

By 1841, ten of the twenty-six states had enacted similar laws. But these laws merely codified the traditional common law understanding of abortion. As under the common law, these statutes applied only to post-quickening abortions, and even in that situation they did not punish the woman. These laws were premised on the twin judgments of the common law that human life did not begin until quickening and that women who sought abortions even post-quickening were not themselves criminals, but "victims of their own moral weaknesses who needed state protection."*

The codification of the common law of abortion in these years reflected no "popular outcry" against abortion and no "public disapproval of the nation's traditional" approach. Neither the popular press nor the religious community called for any change in the traditional view that abortion before quickening was not a matter for state concern.[18]

This was about to change.

IN 1845, New York enacted a novel anti-abortion statute that declared it unlawful for any person to administer, prescribe, advise, procure, or use any "medicine, drug, or substance or thing whatever," or to perform or submit to "any operation, or other means whatever, with intent" to cause

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* Beginning in 1828, several states, including New York, New Jersey, Indiana, Ohio and Missouri,

legalized abortion even after quickening when "necessary to preserve the life of the mother."

"a miscarriage." The New York law applied without regard to whether the abortion was pre- or post-quickening and it applied even to the woman her-self. This was a radical departure from the common law. Over time, the New York approach would become a model for the nation.[19]

Madame Restell was one of the first targets of the new law. She was arrested and charged with illegally procuring a pre-quickening abortion for one Maria Bodine. The trial generated daily headlines and Madame Rest-ell was convicted and sentenced to a year in prison on Blackwell's Island.[20]

SEVERAL FACTORS contributed to this change in the law. First, the number of abortions had increased dramatically in the first half of the nineteenth century, to the point where abortion opponents came to refer to it as "The Evil of the Age." Beginning in the 1840s, abortion became a business "openly traded in the free market." Abortion-related advertising appeared regularly "in urban dailies and rural weeklies, in specialty publications, in popular magazines, in broadsides, on private cards, and even in religious journals," and abortion rates soared from approximately 4 percent of pregnancies in the early years of the nineteenth century to approximately 20 percent by the 1850s.[21]

Second, religious perspectives on abortion shifted during the Second Great Awakening. The traditional Protestant conception of the fetus had assumed that it was not alive until quickening. The new evangelical doctrine of "instantaneity," however, undermined that assumption. To early nineteenth-century evangelicals, the conversion experience, which involved "a sudden, quick transformation" resulting in "rebirth," demonstrated that "one could experience the turning point in an instant." If religious rebirth could occur in an instant, then it followed that human life could be created at the very moment of conception. Abandoning the conventional view that "human life was dormant like an unsprouted seed, until the mother could first sense fetal stirrings," evangelicals of the Second Great Awakening preached that a separate, distinct, and precious life came into being at the instant of conception.[2]

Third, some medical professionals came to the view, based partly on religion and partly on science, that life begins at conception. In 1839, for example, Hugh Lenox Hodge, a professor at the University of Pennsylvania Medical School, published a pamphlet in which he confidently asserted that embryos could think and could perceive right and wrong.[23]

THE AMERICAN MIEDICAL ASSOCIATION

PERHAP THE MOST important cause of the dramatic late nineteenth-century shift in the legal approach to abortion was the aggressive stance taken by the fledgling American Medical Association. This was at a time before doctors were licensed and when they were struggling to gain professional credibility and to assert their dominance over the nation's health care. In the era before the Civil War, doctors were few and far between, there was no standardized training or licensing of physicians, and most health care issues were routinely addressed with home remedies within the family. The newly founded AMA sought to wrest control over health care from the non-professionals, and especially from midwives, who had traditionally been the primary health care providers for pregnant women.[2]

In 1857, the Boston gynecologist Horatio Storer initiated a "Physicians Crusade Against Abortion" and persuaded the AMA to create a Committee on Criminal Abortion. The Committee, chaired by Storer, presented its report at the AMA's 1859 meeting in Louisville. The report decried the growing frequency of the "heinous" act of abortion "among all classes of society, rich and poor, single and married," and maintained that the primary cause of this "general demoralization" of women was the "wide-spread popular ignorance of the true character" of abortion and the belief "that the fetus is not alive till after the period of quickening."

The report declared that this belief was based "upon mistaken and exploded medical dogmas" that had distorted public conceptions of both morality and the law. It explained that "the frightful extent" of abortion was due in part to "grave defects of our laws," which failed to recog-nize "the independent and actual existence of the child before birth, as a living being," from the very moment of conception. Proclaiming that physicians must be the "guardians" of human "offspring in utero," the report called upon the AMA to "publicly express its abhorrence of the unnatural and now rapidly increasing crime of abortion," and to publicly recommend "a careful examination and revision" of the law as it "relates to this crime."

Specifically, the report called upon the AMA to condemn "the act of producing abortion, at every stage of gestation, except as necessary for pre-serving the life of the mother," and announced that only doctors should be permitted to determine whether such necessity existed. Cynics pointed out that this was essentially a power grab from midwives, who previously had

dominated women's gynecological and obstetrical care. After some deliberation, the AMA endorsed the Committee's recommendations. 25

SIX YEARS later, Storer received an award from the AMA for his essay S*o Why Not? A Book for Every Woman* (1865), which condemned abortion in no uncertain terms. *Why Not?* was widely read and was frequently distributed by physicians to patients who were considering an abortion.26 this essay, Storer made essentially two arguments against abortion. First because physicians had determined " that the fetus in utero is alive from the very moment of conception," for a woman "to extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man."

Second, Storer argued that abortion is "a thousand times more dangerous" to the woman than childbirth, in terms of both immediate risk of death and long-term disease and debility. He maintained that many women who have an abortion "become confirmed invalids, perhaps for life," and develop "serious and often fatal organic disease," such as cancer. Some die, either immediately or later, as a result of "moral shock from the thought of the crime," whereas others are driven to insanity. He added that children born to a woman after she has had an abortion tend to be "unhealthy, deformed, or diseased," and that they too will therefore bear the price of their mother's "heinous" act.

Storer emphatically rejected the proposition that the woman should be able to decide this question for herself, noting that if she were given this responsibility "her decision ... would be ... warped by personal considerations," particularly because, during pregnancy, "woman's mind is prone to depression, and, indeed, to temporary actual derangement, under the stimulus of uterine excitement." Moreover, he added, women were born to bear children. "This ... is the end for which they are physiologically constituted and for which they are destined by nature." It therefore followed that for a woman "intentionally to prevent the occurrence of pregnancy, other-wise than by total abstinence from coition," or "intentionally to bring it, when begun, to a premature close, are alike disastrous to a woman's mental, moral, and physical well-being."27

As evident in Starer's reasoning, many of the doctors who most aggressively championed the AMA's position viewed abortion as a moral-as well as a strictly medical-issue. Indeed, the doctors who most fervently championed the anti-abortion cause tended to associate abortion with lewdness, unrestrained sex, obscenity, and rebellious and insatiable women, and they

agitated for a broad range of anti-vice initiatives, including laws regulating such sins as gambling, drinking, and prostitution.[28]

Over the next several decades, the AMA launched an aggressive campaign to rid the nation of abortion. The success of this campaign was facilitated by the late nineteenth-century "social purity" movement, which sought to impose conservative religious and moral "values on the whole society" and to give "the state greater power over areas of life once considered private." The desire of women to control their own bodies and lives was thus castigated by doctors and religious leaders alike as the product of a deformed and insatiable appetite for sex and a selfish desire for economic well-being. As the leading voice of the anti-abortion movement, Horatio Storer insisted that women must remain within their "God-given sphere." The purpose of "American women," he declared, was to produce children, not to "butcher" them.[29]

With increasing leverage, the AMA was able to effect a complete transformation in public perceptions and understandings of pre-quickening abortion. By the end of the century, every state had enacted legislation absolutely prohibiting abortion-pre- or post-quickening-unless a doctor certified that it was necessary to save the life of the woman. Women who sought abortions were now themselves subject to prosecution, and government for the first time aggressively sought to suppress all information about abortion.[30]

But despite the threat of criminal sanctions, the medical profession's warnings about the dangers of abortion, and the preaching of religious moralists, women continued to seek abortions in record numbers. By the turn of the twentieth century, as many as two million abortions were being performed in the United States annually, and almost a third of all pregnancies ended in abortion. As a result of the late nineteenth-century abortion laws, these abortions now had to be performed illegally, in less safe circumstances, and by less reliable practitioners than in the past.[31]

ENTER COMSTOCK (AGAIN)

UNTIL THE 1870s, contraception and information about contraception were generally unregulated in the United States. With advances in the vulcanization of rubber by Charles Goodyear in 1839, condoms, which had previously been made from animal intestines, became commonplace. By the 1860s, rubber condoms, pessaries, diaphragms, IUDs, and syringes for douching were being widely advertised and sold by

pharmacists and